Supreme Court, U.S.
FILED

05-112 MAY 16 2005

NO. OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

October Term 2005

JACK R. FINNEGAN, Petitioner

v.

RICHARD DE FRANCISCO, et al., Respondent

ON WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Jack R. Finnegan
In pro se
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San Clemente, CA
949-492-3837

QUESTION PRESENTED

1. Can anyone possibly say that purposely attempting to destroy the rights of petitioner or destroying petitioner's case in a courthouse by failure to be faithful to established law is not an attack on our system of law?

2. Was it reversible error for petitioner to be denied the right of due process, and equal protection of the laws of the State of California, the California State Constitution and the United States Constitution?

3. Did the California Supreme Court, deprived petitioner the right of due process, and equal protection of the laws in a rush to judgment by refusing to hear petitioner's Petition for Review, when the Appellate court omitted and misstated material facts in the petitioner's brief?

4. Did the California Supreme Court, deprived petitioner the right of due process, and equal protection of the laws in a rush to judgment by refusing to hear petitioner's Petition for Review, when the Appellate court failed to mention material facts in the petitioner's brief?

5. Did the California Supreme Court, deprived petitioner the right of due process, and equal protection of the laws in a rush to judgment by refusing to hear petitioner's Petition for Review, when the Appellate court raised new issues without affording petitioner to file a supplemental brief.

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California Rules of Court, Rule 29(b)

California Government Code §68081

San Francisco v. Pacific Bank (1891) 89 Cal. 23, 25, 26 P. 615, 835

In Regards Jessup (1889)81 Cal. 408, 471-472, 21 P. 976, 22 P. 742, 1028

Louisell and Degan, Rehearing in American Appellate Courts, 44 Calif.. L. Rev. 627 (1956)

APPENDIX

APPENDIX A The final judgment of the California Supreme Court.

APPENDIX B The denial for rehearing in the Court of Appeal, State of California, Fourth Appellate District, Division Three.

APPENDIX C The Opinion of the Court of Appeal, State of California, Fourth Appellate District, Division Three.

OPINIONS BELOW

The final judgment of the California Supreme Court was entered on February 16, 2005. The denial for rehearing in the Court of Appeal, State of California, Fourth Appellate District, Division Three, was entered December 10, 2004. The Opinion of the Court of Appeal, State of California, Fourth Appellate District, Division Three, was entered November 12, 2004

JURISDICTION

The jurisdiction of this Court rests with Title 28 United States Code Section 2104.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Constitution Article III, Section 2, The Judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, and the Laws of the United States;...

Fifth Amendment. No person shall be... nor be deprived of life, liberty, or property, without due process of law;...

Fourteenth Amendment. No persons born... deprive any person...without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

California Rules of Court, Rule 29(b) provides for rehearing on any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, or any misstatement by the Court of Appeal of any issue or material fact, or the court's failure to mention an issue or material fact.

California Government Code § 68081, If the court fails to afford the opportunity, a rehearing is required to be ordered on timely petition of any party.

STATEMENT OF THE CASE

HISTORY OF THE LITIGATION

This lawsuit began as a direct result of an upper landowner diverting the natural water flow onto the lower landowner's property causing two landslides, approximately 30 months apart. The first lawsuit was improvidently and improperly dismissed. The second lawsuit was destroyed 18 days before trial when a non-trial judge exceeding his authority to do so improvidently and improperly excluded the expert testimony of petitioner, a licensed Architect, licensed General Contractor with over 50 years of experience.

FEDERAL QUESTIONS

The federal question of Constitutional basic and fundamental right of due process and equal protection of the laws was first raised in each of the two cases during pretrial procedures.

The federal question of Constitutional basic and fundamental right of due process and equal protection of the laws was first raised in each of the two cases before the Appellate Court.

The federal question of Constitutional basic and fundamental right of due process and equal protection of the laws was first raised in each of the two cases before the California Supreme Court.

REASONS FOR GRANTING THE WRIT

The petition should be granted because this case presents the important issue of equal justice under the law being denied and because a most basic and fundamental right of due process and equal protection of laws to obtain justice arising from certain remedy in the law have been denied.

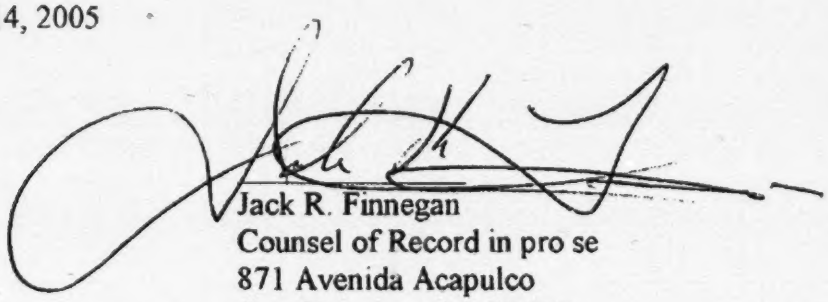
CONCLUSION

The preamble of the Code of Judicial Ethics requires no less than the Constitutional issue of due process and equal protection of laws under the Fifth and Fourteenth Amendments. "Our system is based on the principle that an independent, fair, and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to this code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible member of government under the rule of law."

Wherefore, it is respectfully submitted that the judgment of the court below should be reversed and the cause remanded to California Superior Court for trial on merit.

Respectfully submitted

May 14, 2005



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SUPREME COURT OF THE UNITED STATES

October Term 2005

JACK R. FINNEGAN, Petitioner

v.

RICHARD DE FRANCISCO, et al., Respondent

CERTIFICATION OF COMPLIANCE

The Petition for Writ of Certiorari is proportionately spaced, of Roman type, 11 point type size, with at least 2-point leading between lines and a word count of 1,016 words, margins of 1.0" each side, 1.125" at top and 1.0 at the bottom. The paper is white, at least 60-pound weight.

May 14, 2005

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APPENDIX A

Court of Appeal, Fourth Appellate District,
Division Three - No. G032847
SI 30139

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JACK R. FINNEGAN, Plaintiff and Appellant,

v.

RICHARD DE FRANCISCO ET AL., Defendants and Respondents.

Petition for review DENIED.

SUPREME COURT
FILED
FEB 16 2005
Frederick K. Ohlrich
Clerk

GEORGE
Chief Justice

APPENDIX B

COURT OF APPEAL - STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

COURT OF APPEAL 4th DIST DIV 3
FILED
DEC 10 2004
Deputy Clerk

JACK R. FINNEGAN,
Plaintiff and Appellant,

v.

RICHARD DeFRANCISCO et al.,
Defendants and Respondents.

G032847

Sup. Ct. No.794705

ORDER

The petition for rehearing is DENIED.

SILLS, P.J.

WE CONCUR:

ARONSON, J.

IKOLA, J.

APPENDIX C

FILED
NOV 12 2004
Deputy Clerk

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

JACK R. FINNEGAN,
Plaintiff and Appellant, G032847

v. (Super. Ct. No.794705)

RICHARD DE FRANCISCO, et al., OPINION
Defendants and Respondents.

Appeal from a judgment of the Superior Court of Orange County, Gregory H. Lewis, Judge. Affirmed.

Jack R. Finnegan, in pro per for Plaintiff and Appellant.

Callahan, McCune & Willis and James M. Hansen for Defendants and Respondents.

I. INTRODUCTION

Appellant Jack R. Finnegan presents a series of challenges to the dismissal of his case for not bringing it to trial in five years.

(See Code Civ. Proc., § 583.310 ["An action shall be brought to trial within five years after the action is *commenced* against the defendant."].)

The case was filed May 26, 1998. We will call it the "1998 case." The main problem is that in the summer of 1999, a year after the case was filed, Finnegan's lawyer apparently sank into an emotional depression and neglected the case from there on out. Finnegan woke up to the danger of losing the case in 2002, while there was still time to bring it to trial. However, instead of moving the 1998 case to trial, Finnegan pinned his hopes on filing, in 2002, *another*, virtually identical case. We will call that case the "2002 case." And the strategy worked. The 2002 case *did* go to trial on the merits. (Finnegan's substantive loss on that one is the subject of a companion appeal, G033230.) However, the 1998 case continued to be neglected.

We find none of Finnegan's challenges to the dismissal of the 1998 case meritorious.[1] The most salient fact is that Finnegan himself did nothing to bring the case to trial even though he had over a year to do it after realizing his lawyer was neglecting the case. (See *Wilshire Bundy Corp. V. Auerbach* (1991) 228 Cal.App.3d 1280.)

II. FACTS

On May 26, 1998, Finnegan filed Orange County Superior Court case number 794705 as a pro per against his up-slope neighbors, the De Franciscos. Finnegan claimed various damages to his property resulting from excessive down-hill water flow originating on the De Francisco's property.

Finnegan's original complaint was unclear, but he kept on trying. After his second amended complaint was successfully demurred to, he obtained the services of an attorney, Bruce A. Thomason. Thomason filed a third amended complaint in July 1999

1 The motion to dismiss the appeal as too late is denied. The dismissal of the 1998 was embodied in an unsigned ruling posted via the Internet which became the final ruling of the court via an oral order made July 7, 2003. So, even though the notice of appeal was filed September 15, 2003, technically it was premature, not too late, because there was still no

proper judgment of dismissal under section 58 id of the Code of Civil Procedure (requiring all dismissals to be signed by court). We exercise our discretion to deem the July 7, 2003 dismissal to incorporate a judgment of dismissal so as to reach the merits (see Francis v. Dun & Bradstreet, Inc. (1992) 3 Cal.App.4th 535, 539); no good reason appears in this case not to do so. As to the argument that the substantive loss on the 2002 case, with its largely duplicative causes of action, is res judicata and therefore makes this appeal moot, the simple answer is that res judicata requires a final judgment, and the 2002 case is not yet final.

on Finnegan's behalf. Thomason streamlined the causes of action, reducing them to four, of which three (trespass, negligence and nuisance) had been in his original complaint. However, Thomason included a new cause of action for third-party breach of contract on the theory that when the De Franciscos contracted to have work done on their property, Finnegan was an implied third-party beneficiary. The De Franciscos answered that complaint the next month.

However, soon after filing the third amended complaint Thomason experienced some sort of emotional breakdown or depression (the record is not specific in that regard), and nothing happened in the 1998 case (case number *794705)* until its dismissal in 2003.

However, in February 2002 (with more than a year to go on the 1998 action), Finnegan filed *another* action (as a pro per again) in Orange County Superior Court, case number 02CC03282. The pleading was virtually identical to the third amended complaint filed in the 1998 action except that the 2002 complaint made reference to a new landslide that occurred on February 26, 2001.

The De Franciscos filed a motion to consolidate the two cases. The trial court granted the motion to consolidate and designated the 1998 case number as the lead number. On May 9, 2003, they filed a motion to dismiss the 1998 case. The judge granted the motion and Finnegan appeals from the ensuing judgment of dismissal.

III. DISCUSSION

Finnegan presents three major attacks on the dismissal of the 1998 case: Miscalculation of when the five years began; a need for

tolling; and a violation of due process. We take each challenge in order.

A. *Proper Calculation of When The Five Years Began*

Finnegan first argues that the five-year time period began to run not when he filed his initial complaint in 1998, but when he filed his third amended complaint in 1999. In essence, his position is that by virtue of including a *new claim* in his third amended complaint, he was starting his case anew.

If the De Franciscos had been involved in an auto accident with Finnegan after the landslide, the new claim might indeed have started running with the amended complaint. But that's not this case. The rule in California is that claims which derive from the same nucleus of operative facts or the same transaction *relate back* to the time of initial filing. *(Norgart V. Upjohn Co.* (1999) 21 Cal.4th 383; *Barrington V. A.H. Robins Co.* (1985) 39 Cal.3d 146, 150-151; *Smeltzley V. Nicholson Mfg. Co.* (1977)18 Cal.3d 932, 934-940.) Here, the "third-party beneficiary" breach-of-contract claim clearly came from the same nucleus of operative facts as the other claims based on the landslide. The good news for Finnegan was that, for statute of limitations purposes, his new claim did indeed relate back to the initial filing. The bad news, however, was that, for five-year purposes, it also related back to the initial filing. It could not be considered a "new claim." Time to bring it to trial also began May 26, 1998.

B. *No Requirement of Tolling*

Finnegan proffers four subtheories to support his contention that it was an abuse of discretion for the trial court not to toll or extend the five-year period: (1) the case went out of the court's inventory, i.e., went "off calendar"; (2) frequent transfers of the cases prevented the case from being heard; (3) attorney neglect; and (4) consolidation. None of these justifications are sufficient.

1. The Inventory Question

The computation of time for purposes of the five-year rule will exclude certain periods of time provided one of three scenarios are present: (1) the court loses jurisdiction for some period; (2) the matter was postponed; or (3) "bringing the action to trial, for any other reason, was impossible, impracticable, or futile." (Code Civ. Proc. §583.340.)

Here, Finnegan argues that the five years should have been tolled because the case went off of the court's inventory of active civil cases. The argument fails under *Wilshire Bundy Corp. V. Auerbach, supra,* 228 Cal.App.3d 1280. There, the court was quite plain that removal of a case from a trial court's civil active list does not create impossibility, impracticability, or futility so as to mandate tolling the five years under section 583.340 of the Code of Civil Procedure. Under the rule stated in *Wilshire Bundy,* Finnegan had a duty of diligence to track his case and get it restored to calendar. The court explained diligence as imposing an "obligation to monitor [one's] case in the trial court to ascertain whether any filing, scheduling or calendaring errors have occurred." *(Wilshire Bundy, supra,* 228 Cal.App.3d at p.1287.)

2. The Transfers

Finnegan's second argument is that his case was transferred numerous times and heard by three different judges precluding access to a courtroom. Finnegan cites case law asserting that impossibility is created when a plaintiff is precluded access to a courtroom.

Finnegan is quite correct that lack of access to a courtroom, as such, requires tolling. (E.g., *Rose V. Scott* (1991) 233 Cal.App.3d 537, *541-542.)* The argument fails, though, because the transfers were causally unrelated to the running of the five years. Finnegan had, years before, let the case slip into the slumber of dormancy when the transfers were made; those transfers were independent of his inaction. And Finnegan's argument that the trial court itself had a sua sponte duty to insure that the case was scheduled for trial is, of course, incorrect on the law. (See *Lee V. Park* (1996) 43 Cal.App.4th *305,* 309 ["There is no legal basis for appellants' argument that the trial court had a sua sponte duty to compute the last day for trial and to set the case for trial before that date."].)

3. Attorney Neglect

Finnegan's third theory is that the five-year rule should have been tolled because of his attorney's neglect. Until the decision in *Him V. Superior Court* (1986)184 Cal.App.3d 35, there had never been a case where an attorney's illness tolled the five-year statute. In *Him*, however, the court did allow an attorney's health to justify tolling under a totality of circumstances rule. The court there held that tolling was appropriate because the plaintiff made diligent attempts to ensure that the case moved forward. *(Id.* at p.39.)

But in this case Finnegan did nothing to fill the void left by Attorney Thomason's emotional depression, a fact underscored by Finnegan's own extensive arbitration and prior litigation experience. *He* of all clients (save perhaps for those with full-scale law degrees) should have known that, at the very least, a motion to set the case for trial, or a substitution of attorneys (who would file a motion to set the case for trial), was in order to get the case moving again. And in any event Finnegan himself was certainly aware of the need for such action by February 2002 when he filed his own (almost identical) complaint in pro per.

4. Consolidation

Finally, Finnegan posits that the consolidation of the cases should have tolled the statutory time period. The law is clear, however, that "incidents of proceedings" are not excluded from the computation of time. (See *Moss V. Stockdale, Peckham & Werner* (1996)47 Cal.App.4th 494, 502; *Baccus V. Superior Court* (1989) 207 Cal.App.3d 1526, 1532.) Consolidation is a typical incident of proceeding in a lawsuit and is designed to make courts' calendars more manageable. Again, there was nothing in the court's consolidation of the 1998 matter with the 2002 matter that *caused* any inability on Finnegan's part to bring the 1998 matter to trial; even by 2002 there was still plenty of time. Unlike *General Motors V. Superior Court* (1966) 65 Cal.2d 88, relied on by Finnegan, consolidation did not make it futile to to try the first case, and in fact the second action *was* indeed tried.

Moreover, we must not forget that Finnegan *himself* filed the 2002 action to, among other things, circumvent the time trouble he was in on the 1998 action. He had the option of bringing the 1998 action to trial (and possibly simply supplementing his complaint to include the (new) landslide alleged to have occurred in February 2001), but chose to file an almost identical action. He has only himself to blame for any trouble in coordinating the consolidated action so as to bring it to trial. Indeed, it would be affirmatively inequitable, under the facts of this case, to allow any tolling for consolidation, as it would open up a loophole in the five-year statute: Instead of diligently prosecuting a case to trial, a litigant could circumvent the five-year statute by filing a succession of similar cases. Obviously, a trial judge would be within the bounds of reason to consolidate the cases. However, if consolidated, the litigant could then claim, as Finnegan has done here, that problems in bringing the consolidated case to trial prevented the timely trial of the earlier case(s).

C. *No Violation of Due Process*

Lastly we address Finnegan's argument that application of the five-year rule to the 1998 case offends due process.

First of all, no case has ever held that the mandatory dismissal statute for failure to prosecute offends constitutional guarantees of due process, and that fact itself ought to tell us something. Analogous challenges have been made to statutes of limitation and have been squarely rejected.

In *Ocean Shore RR Company V. City of Santa Cruz* (1961)198 Cal.App.2d 267, 273, the court eloquently explained the law as follows: "It has been held that a constitutional right is always subject to reasonable statutory limitations as to the time within which to enforce it, if the Constitution itself does not provide otherwise. [Citations omitted.] *The power of the legislature to provide reasonable periods of limitation is unquestioned and the fixing of the time limits within which particular rights must be asserted is a matter of legislative policy.* [Citations omitted.] The only restriction as to the legislative power with respect to a statute of limitations is that it must not be so manifestly inequitable as to amount to a denial of justice...."

(Emphasis added.)

A plaintiff is given five years in which to bring a case to trial. (Code of Civ. Proc, § 583.310.) Additionally, the code provides opportunities for the time limitation to be extended. (Code of Civ. Proc., §§ 583.330 & *583.340.)* These rules permit ample time to file and complete an action, particularly since the Trial Court Delay Reduction Act (fast-track) has made commonplace the ability to bring cases to trial in Orange County *within one short year.* (Cf. *Polibrid Coatings, Inc. V. Superior Court* (2003)112 Cal.App.4th 920 [defendant served 14 months into case unduly pressured to go to trial within 10 months of that].)

We need only add that Finnegan's assertion that Judge Lewis was biased against him is not only *not* supported by the record, but affirmatively at odds with the record. Judge Lewis' written decision on the motion to dismiss was not only highly helpful to this court in understanding the case, but reflects independent research beyond just the authorities provided him by the De Franciscos. The written decision reflects a thoughtful analysis of the complexities of the case without the sort of "patronization" that Finnegan (without proof or record reference) has accused him.

IV. CONCLUSION

The judgment is affirmed. However, in view of the fact that much of the delay *was* the fault of Finnegan's attorney, we will exercise our discretion in this case to have each side bear its own costs on appeal.

SILLS, P.J.

WE CONCUR:

ARONSON, J.

IKOLA, J.